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NO. 82-708

**IN THE SUPREME COURT
OF THE
UNITED STATES**

October Term, 1982

SUMMA CORPORATION,
Petitioner,

vs.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,
Respondents.

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA**

# MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE and AMICUS CURIAE BRIEF OF AMIGOS DE BOLSA CHICA

In Support of Respondents

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**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE**

Amigos de Bolsa Chica ("Amigos") respectfully requests leave to file the accompanying amicus curiae brief in support of respondents.

Amigos appeared below as amicus curiae in the proceedings before the California Supreme Court. Respondents City of Los Angeles and the State of California have consented to the filing of the accompany-

ing brief. However, Petitioner has refused to agree to Amigos' appearance as amicus curiae.

## I

## AMIGOS' INTEREST IN THIS PROCEEDING

Amigos is a non-profit association whose members include more than 800 citizens in the southern California area. Amigos was formed for the purpose of attempting to preserve a wetland area called Bolsa Chica near the City of Huntington Beach. Amigos has instituted litigation alleging in part that the Bolsa Chica area is impressed with a public tidelands trust easement, and the litigation is pending.

Part of the Bolsa Chica area was subject to a patent from Mexico. Thus Amigos has a direct and substantial stake in the outcome of this case.

## II

## THE PROPOSED AMICUS CURIAE BRIEF

Amigos' proposed brief as amicus curiae addresses three issues which have

thus far not been discussed by the parties to this case.

First, the ramifications of this case upon the Federal power to regulate navigable waterways under the Federal navigational servitude is discussed. The impact of the decision in this case on the Federal navigational servitude could be serious and far reaching.

Second, the brief discusses the reasons why California law, including the public trust easement, should be applied throughout California without regard to the source of title of the land to which the law is to be applied.

Third, the brief explains how the public trust easement has become a rule of property in California and thus should not be extinguished now.

## III

## CONCLUSION

For the foregoing reasons Amigos therefore requests leave to file the accompanying brief as amicus curiae.

Respectfully submitted,

Lynda C. Martyn

Lynda C. Martyn
Hal Jay Bohner

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# AMICUS CURIAE BRIEF OF AMIGOS DE BOLSA CHICA

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## I

## PETITIONER'S ARGUMENTS, IF ACCEPTED BY THIS COURT, WOULD ADVERSELY AFFECT THE FEDERAL NAVIGATIONAL SERVITUDE

Technically speaking, the federal navigational servitude is not at issue in this case. However, because of the similarity between the California public trust easement and the federal navigational servitude, the outcome of this case will

undoubtedly affect the federal servitude. If California is prohibited from applying its public trust easement to lands granted by Mexico, the logical corollary is that the federal government must likewise be restricted in the application of the federal servitude. Moreover, the federal government would not only be prevented from applying the federal navigational servitude to lands granted by Mexico, but likewise the servitude would be inapplicable to vast areas which had once been granted by other countries, such as grants by France in the southeastern states before the Louisiana Purchase and grants by Russia in Alaska.

Petitioner's grounds for asserting that the California public trust easement is not applicable to lands granted by Mexico are equally applicable to the federal navigational servitude. However, Petitioner is incorrect as to the public trust easement, and thus both the easement and the servitude are applicable regard-

less of the source of title of the land to which they are applied.

The federal navigational servitude is similar to the California tidelands trust easement, and both derive from the same common law source. The federal navigational servitude is a power possessed by the federal government by virtue of its delegation from the states through the Commerce Clause of the U.S. Constitution. Thus the power of the federal government to enforce the federal navigational servitude can be no broader than the power of the states.

The federal navigational servitude is a broad, pervasive power of the federal government.

> "The pervasive nature of Congress' regulatory authority over national waters was more fully described in United States v. Appalachian Power Co., supra at 426-427, 85 L.Ed. 243, 61 S.Ct. 291:
>
> "[I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . In truth the author-

> ity of the United States is the regulation of commerce on its waters. Navigability . . . is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control . . . . [The] authority is as broad as the needs of commerce . . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government."

Kaiser Aetna v. United States, 444 U.S. 164, 173 (1979).

The navigational servitude includes, for example, the right of the federal government to construct improvements in navigable waters even though the improvements adversely affect riparian landowners, Scranton v. Wheeler, 179 U.S. 141 (1900); to remove obstructions in navigable waters, South Carolina v. Georgia, 93 U.S. 4 (1876); and to provide public access to such waters, Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979). The similarity of the navigational servi-

tude to the California public trust easement is clear.

The power of the federal government under the federal navigational servitude is based upon the Commerce Clause of the U.S. Constitution. Kaiser Aetna v. United States, supra at 177. And, such federal power was delegated by the states upon the adoption of the Constitution. South Carolina v. Georgia, supra at 9. Thus, the federal power can be no broader than the states' power.

Petitioner bases its attack on the California public trust easement upon essentially two arguments. First, it asserts that the easement, if it ever existed, was extinguished because it was not confirmed in the proceedings under the 1851 Act. (Br. of Summa Corp. at 27-31.) In the present case neither the United States nor California asserted any servitude or easement interest during the proceedings under the 1881 Act, and the patent was confirmed without recognition

of any such federal or state interest. Petitioner admits:

> "Proceedings under the Act of 1851 are conclusive against the United States . . . . In absence of a reservation in the patent itself, the 1851 Act patent conveyed the entire interest of the United States in the land."

(Brief of Summa Corp. at 27)

Thus, if Petitioner were correct, the 1851 Act proceedings not only extinguished California's easement but the federal navigational servitude as well.

Petitioner's second ground of attack on the California easement is that the Treaty of Guadalupe Hidalgo prevents application of the easement to lands granted by Mexico. Petitioner bases this argument upon language in the Treaty which required that "property of every kind . . . shall be inviolably respected." (Br. of Summa Corp. at 16-18.)

Petitioner's argument applies with equal force to the federal servitude as to the California easement. The Treaty does not place any special obligations upon

California to inviolably respect the property of Mexican citizens nor does the Treaty relieve the federal government of any obligation to respect such property. The Treaty plainly applies with equal force to the federal servitude and the California easement.

In summary, the federal navigational servitude is crucial to federal regulation of navigable waters.[1] If this Court were to accept Petitioner's arguments, the logical corollary would be that the federal navigational servitude would not be applicable to any waterways which had been granted by a sovereign which preceded the United States.

The Solicitor General argues that the federal navigational servitude is applicable to land granted by Mexico although the California public trust is not. (Br.

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1 The Brief of amicus California Land Title Association at page 28, footnote 36 cites six federal regulatory programs under which the federal government regulates navigable waters.

of the United States at 28-29.) However, he fails to point out any reason for treating the California easement differently from the federal servitude other than suggesting that the federal servitude is based upon "legislative power." The meaning of his suggestion is at best unclear, especially since the federal servitude and the California easement both have the same common law source, and in fact the federal servitude is based upon common law powers delegated by the states.

Although the solicitor's argument may be flawed, his concern that the federal navigational servitude may be adversely impacted by the decision in this case is certainly apparent. We share this concern.

## II

## LANDS WHICH HAD BEEN GRANTED BY MEXICO ARE NEVERTHELESS SUBJECT TO CALIFORNIA LAW

In this case Petitioner is in essence arguing that lands granted by Mexico before California acquired statehood should

be exempt from significant and well established California law. Petitioner argues that the Treaty of Guadalupe Hidalgo prevents California from applying its public trust law to certain lands merely because of the source of title of such lands. This argument, however, lacks logic and support in law.

**A. The Treaty of Guadalupe Hidalgo Does Not Suggest Exemption from Non-Discriminatory State Laws for Lands Granted by Mexico.**

The Treaty of Guadalupe Hidalgo does not state or suggest that lands which had been granted by Mexico should be somehow uniquely exempt from state law.[2] On the contrary, Article VIII of the Treaty states that such land should be treated the same as if it belonged to citizens of the United States.

> "In the said territories, property of every kind, now belonging to Mexicans not established

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[2] Even the Solicitor General, in support of Petitioner, seems to agree with this view. (Br. of the United States at 28-30.)

> there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States."

9 U.S. Stat. 922, Article VIII.

The language of a treaty should not be construed to override state law when an alternative construction is possible. Guarantee Trust v. United States 304 U.S. 126, 143 (1938); Todok v. Union State Bank, 281 U.S. 439, 455 (1929).

In the present case, the public trust easement applies equally to all land in California. The Treaty of Guadalupe Hidalgo should not be construed to provide a perpetual exemption from such regulation for land granted by Mexico, especially in view of the plain language in the Treaty.

In the Todok case, supra, the Court considered a treaty which provided that the citizens of Sweden were guaranteed the right to freely dispose of their real

property. The State of Nebraska had applied its statutes which resulted in certain conveyances of property in that state which were owned by a Swedish citizen being void. The Swedish citizen argued that the treaty prevented application of Nebraska law, but the Court held that since the state statute applied equally to U.S. citizens and non-citizens alike it was not overridden by the treaty.

> "The question remains whether the treaty operates to override the law of the State as to the disposition of homestead property. If so, it would appear to place an alien owner of a homestead in Nebraska on a better footing than a citizen of the State. This conclusion seems to us to be repugnant to the purpose of the treaty . . . the general purpose of treaties of amity and commerce is to avoid injurious discrimination in either country against citizens of the other . . . . It is not to be supposed that the treaty intended to secure the right of disposition in any manner whatever regardless of reasonable regulations in accordance with the property laws of the country of location, bearing upon aliens and citizens alike."

Todok v. Union State Bank, supra at 445.

In the present case, like the Todok case the treaty does not override state law. The Treaty of Guadalupe Hidalgo does not provide an exemption from California law for land derived from Mexican grants, and the Treaty should not be construed to give Mexican citizens greater property rights than U.S. citizens.

**B. The Treaty of Guadalupe Hidalgo Does Not Prevent California from Controlling Significant Property Rights**

It is well established that the Treaty of Guadalupe Hidalgo does not prevent a state from controlling significant aspects of fee ownership concerning land which had been granted by Mexico. The types of state control which have been expressly endorsed by the courts are at least as burdensome on the fee owner as is the public trust easement, and the trust easement does not conflict with the Treaty.

In Hagar v. Reclamation District 111 U.S. 701 (1883), land in California which was derived from a grant of the Mexican government had been sold by the state for

delinquent assessments under California's tideland and swampland statutes. The statutes permitted the formation of reclamation districts covering privately owned lands, including tidelands and swamplands. The supervisors of the district were empowered to have improvements constructed and maintained on the private lands and to assess the cost thereof against the land. If the assessments became delinquent, the lands could be sold to satisfy the charges. In the case, certain lands had been sold, and the former owner argued that since the land had been granted by Mexico it was exempt from California's reclamation district law under the Treaty of Guadalupe Hidalgo. This Court disagreed saying,

> "The lands granted by Mexico were not by the treaty, under which California was acquired, exempted from the control that the state exercises over all other lands."

Hagar v. Reclamation District, supra at 706.

The Hagar case clearly permits California to divest a Mexican land grantee of his title to the land. It is difficult to conceive of any state power which could be more burdensome on the fee interest. On the other hand, the public trust easement does not permit California to divest the landowner of his fee interest.

Similarly, in Amaya v. Stanolind Oil and Gas Co. 158 Fed.2d 554 (1946), the court considered the meaning of Article VIII of the Treaty of Guadalupe Hidalgo which provides that the property of Mexican citizens shall be "inviolably respected." At issue was a Texas statute of adverse possession which operated to divest planitiffs of their title to certain lands. The court concluded that the treaty did not prevent passage of "reasonable and non-discriminatory statutes regulating title and possession of land" and concluded that under the Texas statute plaintiffs had lost title. 158 Fed.2d at 558.

The public trust easement is reasonable and non-discriminatory. Plainly the trust is less intrusive on the fee interest than state control of title and possession which has already been sanctioned by this court and others.

The Solicitor General seems to agree with us to the extent that Mexican land grants are not immune from State regulation. But he seems to feel that although there is no immunity from regulation under the police power, such grants are immune from the public trust easement. (Br. of the United States at 29.) He fails, however, to present any logic or law in support of his argument other than to suggest that the public trust is a property right whereas state regulation is not. The significance of this distinction escapes us period. Governmental "regulation" often burdens property rights in ways similar to the public trust. (Note e.g. the regulations cited by the solicitor on page 29 of his brief.) Furthermore, the

Hagar case is not limited to state "regulation." Also, this court has permitted California to actually divest a property owner of his title to land granted by Mexico. Hagar supra. Certainly such state action is more detrimental to fee ownership than state action under the public trust easement, which does not encompass divestiture of the fee.

## III

## MEXICAN LAW IMPOSED A TIDELANDS TRUST EASEMENT IN FAVOR OF THE PUBLIC

The California Supreme Court correctly found that "the law of Mexico at the time of cession declared that the public had a right to use the tidelands; this right was similar to the common law public trust." This holding is based upon clear language of Mexican law and uncontradicted expert testimony.

Law III of Title XXVIII of Las Siete Partides, the law in effect while California was part of Mexico, provided:

> "The things which belong in common to the creatures of this

> world are the following, namely, the ... sea and its shores, for every living creature can use each of these things according as it has need of them. For this reason, every man can use the sea and its shore for fishing or for navigation, and for doing everything there which he thinks may be to his advantage."

Law VI of the same title of Las Siete Partidas provided:

> "Rivers, harbors and public highways belong to all persons in common. . ." (Las Siete Partides, CCH (Spain) (1931) pp. 820-21).

Under Mexican law, the "sea and its shore" included all lands between the low water mark and the extreme high tideline. Under Anglo-American law, tidelands extend only to the ordinary high tideline. Thus, the area covered by the Mexican "shore" is at least as broad and clearly includes all areas of tidelands protected by the Anglo-American tidelands trust. The precise boundaries of tidelands shift from time to time, so the Mexican government did not worry about excluding tidelands from

grants because Mexican law maintained the public's rights to use the tidelands covered by the grants.[3]

## IV

## U.S. COMMON LAW AND CALIFORNIA CASE AND CONSTITUTIONAL LAW IMPOSE A TIDELANDS TRUST EASEMENT.

The common law public trust easement in the United States is essentially the same as the Mexican trust easement discussed above in that the common law easement provides for the public's irrevocable right of commerce, navigation and fishing in navigable waters and on tidelands. For example, in Martin v. Lessee of

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3 For example, the Mexican land grant in this case stated that the area within the grant could be enclosed "without prejudice to the traversing roads and servitudes." An expert on Mexican law testified at the trial court that this was standard language routinely included in Mexican land grants designed to make it clear that the rights of the public in large tracts of land were preserved. One of the rights of the public was the right to use tidelands.

Waddell, 41 U.S. 367 (1842), this Court considered the scope of the trust with respect to public fishing rights under the laws of England and the United States and stated:

> "[A]lthough the king is the owner of this great coast, and, as a consequence of his property, hath the primary right of fishing in the sea and creeks, and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea, or creeks or arms thereof as a public common of piscary . . . 41 U.S. at 412.

In considering the public's right of navigation this Court in Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82 (1913) stated:

> "If the public right of navigation is the dominant right, and if, as must be the case, the title of the owner of the bed of navigable waters holds subject absolutely to the public right of navigation, this dominant right must include the right to use the bed of the water for every purpose which is in aid of navigation." 229 U.S. at 87.

See also, Scranton v. Wheeler, 179 U.S. 141, 144 (1900) affirming that the public

easement for navigation is superior to any private title.

The public trust easement has existed in California by virtue of the common law, case law and the California Constitution. (See discussion below at Section VI.)

## V

## THE FEDERAL PATENTING PROCESS DID NOT EXTINGUISH THE PUBLIC TRUST EASEMENT.

### A. The Federal Patent Confirmed Title as it Existed Under Mexico and Did Not Enlarge the Rights of the Property Owner.

Petitioner's rights under the federal patent are no greater now than were the rights of its predecessors under Mexican law; the land remains subject to the public trust easement. There are a number of reasons for this. First, the federal patent was merely confirmatory of the rights of the Mexican grantee under Mexican law. Moreover, the Board of Land Commissioners had no jurisdiction to remove the public trust easement from the land. Also, the patent issued to

Petitioner's predecessor in interest did not expressly or by implication extinguish the public trust easement. In fact there is no indication that the Board of Commissioners which issued the patent even considered, much less adjudicated, the extent of the public's rights in the land.

It is clear that the federal patent was merely confirmatory of the rights which the Mexican grantee had under Mexican law. The case of Knight v. United Land Association, 142 U.S. 161 (1891), which has been heavily relied upon by Petitioner, is pertinent. In the Knight case this Court considered the effect of a federal patent granted pursuant to the Act of March 3, 1851 to the owner of land under a Mexican grant. The Court held that the patent merely comfirmed the owner's rights as they had existed under Mexican law.

> "[T]he patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition

> did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the former government.

142 U.S. at 188, quoting from Beard v. Federy, 70 U.S. 478 (1866) (emphasis added). See also De Guyer v. Banning, 167 U.S. 723, 740 (1897).

Furthermore, the federal confirmation procedure was established to carry out the provisions of the Treaty of Guadalupe Hadalgo, and the Treaty required that rights acquired under the Mexican government should not be altered.

> "The Treaty of Guadalupe Hidalgo does not purport to divest the pueblo existing at the site of the city of San Francisco, of any rights of property, or to alter the character of the interest it may have held in any lands under the former government." Townsend v. Greeley, 72 U.S. 326, 334 (1867).

Thus, since Mexican law imposed a public trust easement upon the land, the federal

patent merely confirmed the title impressed with the easement.[4]

In fact the Board of Commissioners had no authority to do otherwise, and the Board plainly had no authority to extinguish the public trust easement. This Court has determined that the scope of jurisdiction of the Commissioners pursuant to the Act of March 3, 1851 was limited to

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[4] The Mexican grant itself clearly recognizes the public trust easement. It expressly stated that the grantees "may enclose it [the land] without prejudice to the traversing roads and servitudes." In view of this clear language and the absence of any contrary words, the patent cannot be construed to extinguish the public trust easement. This Court in Martin v. Lessee of Waddell, 41 U.S. 367 (1842) considered the scope of a patent to navigable waters and concluded that:

"It would require very plain language in these letters patents to persuade us that the public and common right of fishery in navigable waters, which has been so long and carefully guarded in England, and which was preserved in every colony founded in the Atlantic borders, was intended in this one instance to be taken away." 41 U.S. at 414.

merely confirming or rejecting claims of title, and they did not have authority to determine whether the title was subject to any trust. Townsend v. Greeley, 72 U.S. 326, 335 (1867), Freemont v. United States, 58 U.S. 541,565 (1854).

In Townsend v. Greeley, supra the plaintiff asserted title based upon a grant from the City of San Francisco which had succeeded to the rights of a Mexican pueblo. The defendant claimed title to the same land based upon a grant to his predecessor from the United States.

The Court found that even though a federal patent had confirmed the fee interest of the City of San Francisco, the city's interest was nevertheless impressed with a public trust which had been imposed on the City's predecessor, the Mexican pueblo, by Mexican law. The court held that the Board of Commissioners had no authority to discharge the trust or even decide whether the trust existed.

Furthermore, despite the Solicitor General's claims to the contrary, neither res judicata nor collateral estoppel applies to bar the ascertion of the public's rights to these tidelands because not only was the Board of Commissioners without authority to adjudicate public tidelands trust rights in areas within the Mexican grants, there is also no evidence that the Board <u>even attempted</u> to adjudicate the extent of the public's rights in these tidelands.

Despite the fact that the patent issued by the Board to Summa Corporation's predecessor in interest makes no mention of any extinguishment of public rights to use the tidelands contained in the patent, the Solicitor General's brief (at pages 21-22) attempts to establish that such public rights to the tidelands were adjudicated in the patent proceedings by emphasizing the dispute that took place at the proceedings as to where the boundary of the Mexican land grant ended. The

grant said that it ended at the sea. The dispute was thus where the edge of the sea, and thus the edge of the grant, was located, not the extent of tidal marshes within the grant. Thus, the proceedings give no indication whatsoever that the issue of any public rights to the use of the tidelands within the grant were even considered much less adjudicated.

The Solicitor General's brief argues (at pages 23-24) that the fact that the state failed to come forward at the hearings to assert the public's rights in the tidelands demonstrates that no such rights existed. This is simply a non-sequiter. The fact that the state failed to come forward to assert the public's rights in the tidelands does not show that no such rights existed; rather, it merely serves to emphasize that those rights were not even considered at the Board of Commissioner's hearings.

In summary, it is thus clear that, under Mexican law, the public's right to

use tidelands was at least as broad, if not broader, than the public's rights under the Anglo-American tidelands trust doctrine as applied by both the United States and California. Further, the public's rights to use tidelands under the Mexican equivalent of the tidelands trust was not extinguished by the Treaty of Guadalupe Hidalgo or the patent proceedings that took place pursuant thereto.

**B. The Treaty of Guadalupe Hidalgo Required That the Public Trust Easement Be Imposed.**

United States common law imposes the public trust easement on all tidelands and navigable waters. Illinois Central Railroad v. Illinois 146 U.S. 387, 436, 437 (1892); Martin v. Lessee of Waddell, 41 U.S. 367, 408 (1842). California law is the same. People v. California Fish Co., 166 Cal. 576 (1913). No case has ever held or even suggested that the nationality of the holder of title to tidelands could affect the existence of the public trust easement.

The Treaty of Guadalupe Hidalgo expressly required that the holders of perperty under a grant from Mexico should have the same property rights as if the land were held by a United States citizen.

> "In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States."

9 U.S. Stat. 922, Article VIII.

Plainly the Treaty does not provide that the grantee of property from Mexico should have greater rights than one who holds property by a virtue of a grant from the U.S. or California. Thus the Treaty required that the public trust easement remain on lands granted by Mexico just as the trust easement was imposed on all land granted by the U.S. or California. Moreover, the federal patenting process pursuant to the Act of 1851 must have conformed

to the Treaty. Therefore, the patenting process did not extinguish the trust easement.

Not only does the plain language of the Treaty of Guadalupe Hidalgo mandate this conclusion, but a treaty must be presumed to provide equal property rights to a non-citizen as to a citizen. Todok v. Union State Bank, 281 U.S. 439 (1930). The normal purpose of a treaty is to prevent injurious discrimination by one country against the citizens of another.

> "While treaties, in safeguarding important rights in the interest of reciprocal beneficial relations, may by their express terms afford a measure of protection to aliens which citizens of one or both parties may not be able to demand against their own government, the general purpose of treaties of amity and commerce is to avoid injurious discrimination against the citizens of the other.

Todok v. Union State Bank, supra, at 454-455.

The Treaty of Guadalupe Hidalgo did not expressly provide that citizens of Mexico should be given greater property

rights than American citizens. On the contrary, the treaty required equal rights.

### C. The Public Rights Which Existed Under Mexican Law and United State Common Law Were Not Extinguished By the Change of Sovereignty

The public trust easement was established by Mexican law and continued under United States common law unaffected by the fact that the sovereign administering the trust for the public benefit had changed. This is mandated by well established principles of international law and by the Treaty of Guadalupe Hidalgo.

This Court has made it clear that the public trust easement is of paramount public importance and cannot be extinguished merely by a change in the sovereign which is administering the trust for the public benefit. For example, in Martin v. Lessee of Wadell, 41 U.S. 367 (1842), this Court held that under English law the king held property under navigable waters in trust for the public although

title to the land had previously been granted to a private party. The Court further held that when the State of New Jersey became sovereign over the property it had the same obligations as the king had to protect the public rights. The cases of Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82 (1913) and New Orleans v. Louisiana, 35 U.S. 662 (1836) stand for essentially this same principle. Furthermore, the case of Townsend v. Greeley, supra is particulary pertinent. In the Townsend case land was held by a Mexican pueblo, and sovereignty passed to the City of San Francisco upon admission of California to the union. The pueblo under Mexican law had held the land in trust for the public, and the court held that the City of San Francisco succeeded to the rights and obligations of the pueblo and held the land in trust for the public.

In the case of Carver v. San Pedro Co., 151 Fed.334 (1906) the court applied this principle to land in California which

had been conveyed to a private party by the Mexican government and which was confirmed by a federal patent. The court said:

> "If it be conceded, however, that the legal title to the shore or tideland, or even the bed of said slough, passed by the Donimquez [Mexican] patent, still it was subject to the public right of navigation and the power of Congress under the commerce clause of the Constitution to regulate the same." 151 Fed. 334, 337.

The fact that California is the trustee of the public trust easement is completely consistent with the well established principle that whenever a political jurisdiction over any territory is transferred from one nation or sovereign to another, the laws concerning property continue in force until changed by the new sovereign. Chicago and Pacific Railway Co. v. McGlinn, 114 U.S. 542 (1885). Both U.S. common law and California law provide a public trust. Thus whichever of these entities is considered the "new sovereign" the public trust subsists because neither extinguished the trust.

## VI

## THE PUBLIC TRUST EASEMENT HAS ALWAYS EXISTED IN CALIFORNIA AND HAS BECOME A RULE OF PROPERTY.

Certain amici in behalf of Petitioner argue that historically there has been no public trust easement on lands which were granted by Mexico. They argue that this has become a rule of property which should be preserved and that the California Supreme Court has improperly reversed the rule in this case. However, exactly the opposite is true. In fact the rule of property in California is and historically has been that the public trust easement applies to lands granted by Mexico as well as other lands.

### A. California Case Law and the California Constitution Have Historically and Consistently Imposed the Public Trust Easement on Lands Granted by Mexico.

Initially it should be recognized that no provision of California law, either by case or statute, has ever provided that tidelands granted by Mexico are exempt from the public trust easement. Case and

statutory law have consistently been to the contrary.

California was admitted to the Union in 1850 and shortly thereafter in 1867 the California Supreme Court stated:

> "If the Mexican Government had made any rightful disposition of lands which she held as sovereign, neither the United States nor the State, as succeeding sovereigns, could disregard it any more than in the case of other lands. But by this we do not desire to be understood as holding that the Mexican Government, or this State, has the same power of absolute alienation over lands held in virtue of their sovereignty which they have over other lands. The lands which the State holds by virtue of her sovereignty, as is well understood, is such as is covered and uncovered by the flow and ebb of the neap of ordinary tides. Such land is held by the State in trust for the benefit of the people. The right of the State is subservient to the public rights of navigation and fishery. . ."

Ward v. Mulford, 32 Cal. 365 (1867).

In addition to the common law as stated by the Ward court, in 1879 the California Constitution was amended to

include Article X, Section 4[5] - which guarantees public access to tidelands and the public right of navigation in tidewaters.

> No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof. Article X, Section 4 of the California Constitution.

Plainly this Constitutional section by its terms is not limited to lands not granted by Mexico, and obviously it is intended to apply regardless of the source of title of the land. No court has ever

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5 This Constitutional section was originally numbered Article XV, Section 2. In 1976 the section was renumbered to Article X, Section 4.

held that lands granted by Mexico are exempt from this Constitutional provision.

The case of City of Long Beach v. Mansell, 3 Cal.3d 462 (1970), demonstrates that the California courts have consistently held that lands granted by Mexico are subject to the public trust easement. In the Mansell case, the California Supreme Court considered whether the easement applied to certain lands which were part of Rancho Los Alamitos which had been created by a grant of the Spanish governor in 1784 which was confirmed by a decree of the Mexican government in 1833. In 1857 the U.S. District Court confirmed a claim to the Rancho which had been filed with the Board of Land Commissioners. 3 Cal.3d at 468. The Court held that certain of the lands in question which had been part of the Mexican Rancho grant were "indisputedly public tidelands." 3 Cal.3d at 481. The court conducted an extensive analysis to determine which of the lands in question were subject to the public

trust established by Article XV, Section 3 of the California Constitution and concluded that certain of the lands were subject to Article XV, Section 3. 3 Cal.3d at 487.

Likewise in Carver v. San Pedro, 151 Fed. 334 (1906) the Federal Circuit Court of Appeals considered the public's right to use certain waters in California which allegedly were derived from a Mexican patent. The court held that even if the land had been part of a Mexican patent, the river was nevertheless subject to the public right of navigation.

**B. California Has Consistently Regulated All Lands in the State Alike. To Now Create a Special Exception for Land Derived from Mexico Would Throw California Law into Chaos.**

Petitioner argues for a new legal principle which would single out lands once patented by Mexico to private persons for special treatment under California law. However, California has never recognized such a rule and to now require special treatment for such lands would be

incredibly disruptive to the California legal system, not only with respect to tidelands but in countless other areas as well.

California currently has numerous regulations of land in addition to the public trust easement which have always been applied without regard to the source of title. For example, California Government Code Section 66600 et seq. provides a comprehensive scheme for regulating development in San Francisco Bay. The California Coastal Act, California Public Resources Code Sections 30000 et seq. provide a regulatory program for all of the California coastline. California Civil Code Section 3479 provides that obstruction of free passage in navigable waters is a public nuisance, and California Harbors and Navigation Code Section 131 provides that obstruction of a navigable waterway is a misdemeanor. None of these California statutes provides an exemption for lands or overlying waters

which had been patented by Mexico to a private grantee.

To suddenly impose such a distinction now would result in innumerable claims for exemption from the effect of these statutes. The net result would be to deprive the governmental agencies, charged with regulating tidelands and navigable waters, of any real power. California's beaches which are now public would become a checkerboard of public and private holdings dotted with "No Trespassing" signs and crossed with barbed wire. California's rivers are now open for canoeing, white water rafting, and other forms of water-related recreation. See Hitchings v. Del Rio Woods, 55 Cal.App. 3d 560 (1976). However, they would become impassable to the public in random locations arbitrarily determined based upon Mexican land grants over one hundred years old.

The potential disruption of California property law and regulation is enormous.

Amicus California Land Title Association asserts that, "Title to over 8-1/2 million acres of California land is based upon federally-patented Mexican land grants. Although the Mexican government did not regularly convey beaches, bays, or navigable rivers and lakes into private ownership, shallow lagoons, tidal sloughs, small streams and ponds were often included within Mexican grants." (Br. of California Land Title Association at 5.)

Moreover, the rule Petitoner is arguing for would not logically be limited to tidelands, but would extend to all police power regulations. For example, California cities would have to check the source of title to a parcel of land before deciding whether they could apply their zoning laws thereto.

Plainly the far-reaching effects of petitioner's proposed new rule of law would throw land regulation in California into complete chaos. Such a rule should not be established.

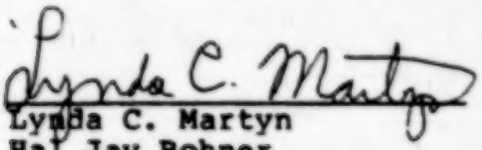
## VII

## SUMMARY

Petitioner is incorrect and the holding of the California Supreme Court should be affirmed. If Petitoner's arguments were accepted by this court, the results would be disastrous for the regulatory programs of not only California but many other states and the Federal government as well. The public trust easement is not unique to California but is based upon common law and thus is applicable to all states and to the Federal government through the Federal navigational servitude. If this Court were to hold that the public trust easement were not applicable to lands granted by Mexico, the same principle would require that neither the Federal government nor any other state could apply the Federal navigational servitude or the common law trust to lands granted by a prior soverign. Federal control of commerce in navigable waters would be

thrown into chaos, and the adverse effects upon the states is incalculable.

Respectfully submitted,



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